In the

Supreme Court of the United States

No. 75-759

JAMES MICHAEL TAYLOR and GLORIA JEANE TAYLOR, husband and wife, on behalf of themselves, individually, and on behalf of others who may be members of a class of persons similarly situated,

Petitioners,

v.

ST. VINCENT'S HOSPITAL, a Montana Corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for The Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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SUBJECT INDEX

INDEX OF AUTHORITIES

CASES

INDEX OF AUTHORITIES (Cont).

STATUTES

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OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 523 F.2d 75 (9th Cir. 1975).

JURISDICTION

The jurisdictional requisites are sufficiently stated in the Petition.

QUESTIONS PRESENTED FOR REVIEW

Respondent accepts the statement of question numbered III set forth on page 4 of the Petition. However, questions numbered I and II on that page of the petition are more accurately stated as follows:

I. Whether Congress can constitutionally protect denominational hospitals by enacting legislation providing that such hospitals cannot be forced to allow surgical sterilizations in their facilities, contrary to religious beliefs, because of the acceptance of Hill-Burton funds?

II. Whether there is sufficient state nexus to find that a denominational hospital is acting under color of state law where regulation, licensing, tax exemption, and receipt of Hill-Burton funds are not related to the prohibition, because of religious beliefs and moral convictions, of the use of its facilities for voluntary surgical sterilizations?

STATUTES INVOLVED

This case involves two statutes in addition to § 401 (b) of the Health Programs Extension Act of 1973 (42 U.S.C. § 300a-7) quoted on pages 2-3 of the Petition. These statutes are 28 U.S.C. § 1343 and 42 U.S.C. §1983 which are printed in the Appendix.

STATEMENT OF THE CASE

Respondent St. Vincent's Hospital and Deaconess Hospital are the only hospitals in Billings, Montana. In June, 1972, the maternity departments of the two hospitals were combined at St. Vincent's Hospital and an intensive care nursery facility was constructed as a part of the consolidation in order to reduce infant mortality in the community and to reduce the cost to the community of duplicated maternity services. A prior feasibility study had estimated that it would cost approximately $900,000 to combine the facilities at Deaconess Hospital, while the cost of locating the combined facility at St. Vincent's was estimated at only $50,000. Because of the cost, Deaconess Hospital was unwilling to accept the combined facility and it was apparent that the intensive care facilities and better maternity facilities would not be provided for the community unless they were combined at St. Vincent's Hospital. Prior to approving consolidation of maternity services at St. Vincent's Hospital, the Trustees of Sisters of Charity of Leavenworth advised local obstetricians and trustees of Deaconess Hospital that surgical sterilizations would not be allowed at St. Vincent's Hospital.

The Petitioners, Mr. and Mrs. Taylor, who expected delivery of their second child at St. Vincent's Hospital by cesarean section, requested permission of

the hospital for Mrs. Taylor to be sterilized there by tubal ligation at the same time as the cesarean section. This request was denied on the basis of the "Ethical and Religious Directives for Catholic Health Facilities". Thereafter the Petitioners filed this action seeking money damages, [1] and both a preliminary and a permanent injunction compelling the hospital to permit Mrs. Taylor and others similarly situated to have tubal ligations in conjunction with child delivery by cesarean section in the hospital.

Prior to the commencement of the action, St. Vincent's Hospital and Deaconess Hospital entered into an agreement whereby after a woman had been admitted to St. Vincent's Hospital she could be transferred by ambulance approximately two and a half city blocks to Deaconess Hospital where the cesarean section and tubal ligation could be performed and the baby delivered. It provided for the maintenance and transfer of intensive care equipment (a Kreiselman and Armstrong incubator and adapter) to Deaconess Hospital the evening before the scheduled surgery, and the transportation back to St. Vincent's Hospital of the intensive care equipment, mother and newborn child, after surgery.

Initially, on October 27, 1972, the district court

1. No monetary damages appear in the Stipulation of Facts filed in the district court and no proof of damages was ever offered.

nonetheless issued a preliminary injunction allowing Mrs. Taylor to have a tubal ligation with the cesarean section at St. Vincent's Hospital and found that the hospital had acted "under color of state law" within the meaning of 28 U.S.C. § 1343 and 42 U.S.C. § 1983 by virtue of its advantageous state tax position and receipt of Hill-Burton funds. The tubal ligation was performed on Mrs. Taylor. However, on June 18, 1973, the "Church Amendment", (§ 401(b)) of the Health Programs Extension Act of 1973, P.L. 93-45, 87 Stat. 91, was signed into law. Thereafter, finding that "(b)y its plain language, the Act prohibits any court from finding that a hospital which receives Hill-Burton funds is acting under color of state law," the district court dissolved its prior injunction and denied all relief.

On appeal the Court of Appeals for the Ninth Circuit affirmed.

REASONS FOR DENYING THE WRIT

The court below ruled for Respondent on separate and independent grounds. First, the court reaffirmed the constitutionality of § 401(b) of the Health Programs Extension Act of 1973, [2] and held that it precludes the injunctive relief the petitioners seek. Second, the court found that "state action or color of state law was

2. Previously in **Chrisman v. Sisters of St. Joseph of Peace**, 506 F.2d 308 (9th Cir. 1974), the Ninth Circuit ruled § 401(b) to be constitutionally valid.

not involved" (523 F.2d at 78) in the rule of St. Vincent's Hospital against surgical sterilization. Special and important reasons of sufficient dimensions to justify a review of these rulings are totally lacking.

I.

No Conflict Exists Among the Circuits Respecting The Validity of §401(b) of the Health Programs Extension Act of 1973, and its Validity is not Legitimately in Doubt.

The ruling upholding and applying § 401(b) of the Health Programs Extension Act of 1973 does not conflict in any respect with decisions rendered by other courts of appeals. The only case involving § 401(b) decided by another court of appeals is *Doe v. Charleston Area Medical Center, Inc.*, ... *F.2d* ..... (4th Cir. 1975). The court of appeals in that case struck down a rule against abortion promulgated by the Charleston Area Medical Center. The court ruled that § 401(b) was not in issue because a state criminal abortion statute was the basis of the hospital's rule, not religious beliefs or moral convictions. There was not even a suggestion in the court's opinion, however, that it doubted the validity of § 401(b) or that it would hesitate to apply it in an appropriate case.

The principles of constitutional law which compelled the Ninth Circuit to uphold § 401(b) have been fully settled by this Court and are not controversial in

the lower federal courts. Consequently, although the Court has not specifically passed on the constitutional validity of § 401(b), it need not do so.

That legitimate interests are served by such provisions and that Congress has the power to enact them are conclusions which clearly emerge from previous decisions of the Court. Section 401(b) was enacted by Congress to protect the religious freedom of those who object to sterilization and abortion for religious and moral reasons. The need of denominational hospitals for this protection was recognized in *Doe v. Bolton*, 410 U.S. 179 (1973). In ruling the Georgia criminal abortion statute unconstitutional, the Court recognized that a hospital "has legal rights and obligations" (410 U.S. at 197), but held that a mandatory hospital abortion screening committee could not be justified as a necessary means of protecting religious and moral beliefs of physicians and denominational hospitals because these rights were protected by other Georgia laws. Commenting on these laws which permitted doctors to decline to perform abortions and hospitals to refuse to allow abortions in their facilities, the Court said:

> "And the hospital itself is otherwise fully protected. Under (Georgia law) the hospital is free not to admit a patient for an abortion. It is even free not to have an abortion committee. Further a physician or any other employee has a right to refrain, for moral or religious reasons, from participating in the abortion procedure. These provisions obviously are in the statute *in order to afford appropriate protection to the individual and to the de-*

nominational hospital." (Emphasis added.) *Doe v. Bolton,* 410 U.S. at 197-198.

This case does not present a legitimate issue of whether Congress has encroached upon the judicial function. Section 401(b) does not affect the judicial prerogative of deciding whether or not "state action" is present in a particular case. Rather, it is a jurisdictional statute which is narrowly drawn to eliminate the power to issue injunctive relief in cases where receipt of Hill-Burton funds is essential to jurisdiction. This restriction of jurisdiction is clearly within the power of Congress; the Court has consistently held that Congress can alter and modify the jurisdiction which it has conferred upon the inferior United States courts. See, e.g., *Cary v. Curtis,* 44 U.S. (3 How.) 236 (1844); *Kline v. Burke Construction Co.,* 260 U.S. 226, 234 (1922); *Lauf v. E. G. Shinner & Co.,* 303 U.S. 323, 330 (1938); *Lockerty v. Phillips,* 319 U.S. 182, 187 (1943).

And there is no significant question here of a possible Congressional violation of the Establishment Clause of the First Amendment. The hospital, too, has rights under the First Amendment. [3] In *Sherbert v. Verner,* 374 U.S. 398 (1963), the Court ruled that South Carolina could not require a Seventh-day Adventist, as a condition to receipt of unemployment benefits, to submit herself for employment which required her to

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3 Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 115 (1952).

work on Saturdays in violation of her religious beliefs. The Court said:

> "In holding as we do, plainly we are not fostering the "establishment" of the Seventh-day Adventist religion in South Carolina, for the extension of unemployment benefits . . . reflects nothing more than the governmental obligation of neutrality in the face of religious differences . . . ." 374 U.S. at 409.

Similarly, the enactment of § 401(b) does not "foster the 'establishment'" of those religions which regard voluntary sterilization and abortion as immoral or sinful. To the contrary, Congress has maintained its neutrality in this debate by preventing the reception of federal funds from being used as a basis for compelling a hospital to allow such surgery contrary to its religious and moral beliefs. Section 401(b) plainly does not transgress the Establishment Clause. *Walz v. The Tax Commission of the City of New York,* 397 U.S. 664 (1970).

The arguments underlying the Petitioners' attack on the constitutionality of § 401(b) do not present serious, difficult or controversial issues meritorious of this Court's attention.

II.

The Circuit Court's Ruling on the State Action Issue is Clearly Correct and Does not Present an Appropriate Question for Review.

The finding of the Ninth Circuit that color of state law is not involved in St. Vincent's rule against sterili-

zation likewise is not appropriate for review. The ruling of the court below on this issue was only an alternative ground for its decision. Since the court correctly ruled that § 401(b) is valid and eliminates the power to grant the injunction the Petitioners seek, the state action issue need not be reached.

However, Petitioners urge the Court to grant certioari to resolve the question of whether color of state law must be found in rules of private hospitals concerning sterilization and abortion procedures because of the reception of Hill-Burton Act funds. The decision in this case is in accord with a long line of cases. [4]

On December 1, 1975, the Court denied the application for a writ of certioari in *Greco v. Orange Memorial Hospital Corporation,* Cause No. 75-432, seeking review of the decision of the Court of Appeals for the Fifth Circuit, reported at 513 F.2d 873 (5th Cir. 1975). The same issue was involved in that case and the ruling was the same as here. Although both St. Vincent's and Orange Memorial hospitals have received Hill-Burton Act funding, the instant case is even less appropriate for review than was *Greco.* St. Vincent's Hospital is a privately owned and operated denominational hospital. Orange Memorial Corporation, however, was not denominational; moreover, the hospital facilities were owned by the public and leased to the corporation. *Greco* thus presented a more substantial state action issue than the present case in light of *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961).

4 Doe v. Bellin Memorial Hospital, 479 F.2d 756 (7th Cir. 1973); Ward v. St. Anthony Hospital, 476 F.2d 671 (10th Cir. 1973); Watkins v. Mercy Medical Center, 520 F.2d 894 (9th Cir. 1975); Jackson v. Norton-Children's Hospitals, 487 F.2d 502 (6th Cir. 1973); Barrett v. United Hospital, 376 F. Supp. 791 (S.D.N.Y. 1974); Allen v. Sisters of Joseph, 361 F. Supp. 1212 (N.D. Tex. 1973), aff'd 490 F.2d 81 (5th Cir. 1974). See also Nyberg v. City of Virginia, 495 F.2d 1342, n.6 (8th Cir. 1974).

The circuit court's finding that there is no color of state law or state action in the surgical sterilization rule of St. Vincent's Hospital is clearly correct. In *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345 (1974), the Court held that a finding of state action in the conduct of a state regulated entity must be based upon "a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself". (419 U.S. at 351). A "nexus" is totally lacking between St. Vincent's ban on voluntary sterilization surgery in the hospital and grants by the state of Montana of Hill-Burton Act funding to the hospital.

CONCLUSION

For these reasons the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

28 U.S.C. § 1343

"§ 1343 Civil rights and elective franchise.

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

"(3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;"

42 U.S.C. § 1983

"§ 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."